

FIRST DIVISION
NOVEMBER 12, 2013

No. 1-11-3655

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 01 CR 29163
)	01 CR 29164
)	01 CR 29165
)	
FRANCISCO MORENO,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed the defendant's first-stage postconviction petition where its allegations were contradicted by the original record of plea proceedings.
- ¶ 2 Defendant Francisco Moreno appeals from an order of the circuit court of Cook County which summarily dismissed his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The defendant asserts that the circuit court applied an improper standard when evaluating his petition and that his petition was sufficient to survive first-stage

review. We affirm.

¶ 3 The record shows that on December 5, 2001, a Cook County grand jury returned indictments for 117 counts of aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, aggravated kidnapping, kidnapping, predatory criminal sexual assault of a child, and child pornography pertaining to three underage victims, Al.M., E.M., and Ab.M., who were siblings.

¶ 4 On October 20, 2003, the defendant appeared with private counsel, Elliot Zinger, who informed the trial court that the defendant wished to enter a negotiated guilty plea. In exchange for a 30-year prison sentence, the State dismissed all but three of the counts.¹ On November 17, 2003, the defendant filed a motion to withdraw his plea and vacate judgment, contending that counsel incorrectly told him that even though he had pled guilty, he could still appeal an earlier ruling on his motion to quash his arrest and suppress evidence. On December 3, 2003, the trial court granted the defendant's motion to withdraw his plea and all the charges against the defendant were reinstated. On January 15, 2004, counsel filed a motion to withdraw, stating that attorney Dennis Giovannini had indicated to counsel that the defendant did not wish for counsel to represent him anymore.

¶ 5 On July 15, 2004, the defendant appeared with Giovannini to enter a blind plea of guilty. After the State said that it agreed to dismiss all but five counts, the trial court stated that the State and the defendant would argue for the sentence they felt was appropriate, but the trial court would determine the penalty. The trial court then proceeded through admonishments for the following

¹In his postconviction petition, the defendant calculates his sentence by taking into account various sentencing credits. For the purposes of this order, we refer to the defendant's sentences without taking such credits into account.

counts: two counts of aggravated criminal sexual assault for acts involving Al.M.; one count of predatory criminal sexual assault of a child; one count of aggravated criminal sexual assault for acts involving E.M.; and one count of aggravated criminal sexual assault for acts involving Ab.M. For each set of counts, the trial court determined the defendant's understanding of the charges. The court also noted the applicable Class X sentencing range for each count, and informed the defendant that the State and defense counsel would argue for either consecutive or concurrent sentences.

¶ 6 During the portion of the proceeding relating to Al.M., the trial court and the defendant had the following colloquy:

"THE COURT: Also, Mr. Moreno, we talked about, when you were here obviously before earlier about a blind plea, what that means is there is no agreement between your lawyer and the [S]tate as to what sentence you might receive. Do you understand that?

[DEFENDANT]: Yes.

THE COURT: The State will argue whatever sentence they think is appropriate. Your lawyer will argue whatever he thinks is appropriate for you to be sentenced to. I will decide myself what sentence you should receive, do you understand that?

[DEFENDANT]: Yes.

THE COURT: In other words there is no agreement between the State and your lawyer as to what sentence you should get. That's up to me to decide. Do you understand that?

[DEFENDANT]: Yes."

Additionally, the trial court also determined the defendant's understanding that the State would argue for an overall sentencing range between 30 and 120 years, and defense counsel would argue for a sentencing range between 6 and 30 years. The trial court then stated:

"I would decide based on the pre-sentence report, arguments made by your lawyer and the State's Attorney, and also the law that applies to the cases whether or not the State's position is correct either all or in part or whether your lawyer's position is correct all or in part. Do you understand that?"

The defendant indicated he understood.

¶ 7 After being asked, the defendant affirmed that he wished to plead guilty to each set of counts.

The trial court and the defendant then had the following exchange:

"THE COURT: Has anybody used any force or threats or done anything to you physically or in any other way to cause you to plead guilty to any of those charges?

[DEFENDANT]: No, your Honor.

THE COURT: Are you pleading guilty therefore freely and voluntarily?

[DEFENDANT]: Yes."

The trial court asked the defendant if, understanding he was giving up various rights, he still wanted to plead guilty. The defendant indicated that he did. Upon hearing something the defendant said,

the trial court then stated:

"Mr. Moreno, if you don't want to plead guilty, you don't have to. *** You don't want to plead guilty just don't do it. We'll try the case. *** [T]he law does not require nor do I require that a man admit that he committed the crime in order to plead guilty."

After the defendant again confirmed that he wanted to plead guilty, he and the trial court had the following colloquy:

"THE COURT: I asked you before what I'll ask you again, so there is no confusion later on ***. Has anybody used any force or threat or done anything to you physically or in any other way to cause you to plead guilty to any of those [five] charges?

[DEFENDANT]: No, Judge.

THE COURT: Are you pleading guilty therefore freely and voluntarily?

[DEFENDANT]: Yes.

THE COURT: Again have you understood what I said to you so far today about the possible sentencing range you can receive when you come back for sentencing ***?

[DEFENDANT]: Yes."

¶ 8 The State then provided the following factual basis. If the cases proceeded to trial, the State would present videotapes, photographs, and handwritten confessions from the defendant that

describe and depict various sexual acts involving the victims. Each victim would be able to testify to the acts committed by the defendant and would identify the defendant as the perpetrator of those acts.

¶ 9 The trial court and the defendant then engaged in the following exchange:

"THE COURT: Mr. Moreno, you understand when you come back for sentencing ***, the State will argue that the minimum sentence you can receive would be 30 years. The maximum would be 120.

Your lawyer will argue for a range in the minimum sentence of 6 years to a maximum of 30 years.

Do you understand that[?]

[DEFENDANT]: I do.

THE COURT: I'll decide the sentence myself based on the law and the evidence and arguments by your lawyer and the State next time, do you understand that?

[DEFENDANT]: Yes.

THE COURT: Do you have any questions, Mr. Moreno?

[DEFENDANT]: No, your Honor."

¶ 10 After a sentencing hearing, the defendant was sentenced to two consecutive 10-year prison terms for the counts involving Al.M. Also, the defendant was sentenced to one 10-year prison term for the count involving Ab.M., to run concurrently to the sentence for the counts involving Al.M.

Finally, the defendant was sentenced to two concurrent 14-year prison terms for the counts involving E.M., to run consecutively to the prison terms for the counts involving Al.M., for a total of 34 years in prison.

¶ 11 The record shows that two motions to reconsider the defendant's sentence were filed, one by Giovannini and one by attorney Thomas Brandstrader, who also represented the defendant during his direct appeal. The motions argued that the defendant's overall sentence was an abuse of discretion and excessive, and that the sentences pertaining to Al.M. should run concurrently rather than consecutively. The trial court denied both motions.

¶ 12 On direct appeal, the defendant argued that his 34-year sentence was excessive, vindictive, improper, and constituted an abuse of discretion. The defendant contended that his sentence was inappropriate because there was no change in circumstances between his first and second plea, but the trial court nonetheless imposed an additional four years' imprisonment. Additionally, the defendant argued that the trial court improperly sentenced him to consecutive sentences for the two counts of aggravated criminal sexual assault against Al.M. The appellate court affirmed the defendant's sentence on January 24, 2007. *People v. Moreno*, No. 1-05-1232 (2007) (unpublished order under Supreme Court Rule 23).

¶ 13 Represented by attorney Michelle Gonzalez, the defendant filed the instant postconviction petition on May 17, 2011. The defendant alleged that he was denied effective assistance of counsel because Giovannini erroneously informed him that if he withdrew his negotiated guilty plea, Giovannini could obtain a shorter sentence for him. The petition further alleged that Giovannini told the defendant that the defendant's new sentence could no be longer than the first sentence he received

as part of his negotiated guilty plea. The defendant claimed that he relied on those guarantees when he withdrew his guilty plea, and that he discussed these facts with his appellate counsel, Brandstrader. However, the defendant claimed that Brandstrader had informed him there were no grounds for a postconviction petition. It was only when the defendant spoke with his current attorneys that he learned that "the legal guarantees given to him by attorneys Giovannini and Brandstrader were incorrect in law and in fact."

¶ 14 In support of his allegations, the defendant attached a letter from Brandstrader, dated October 25, 2007. In this letter, Brandstrader wrote that while he initially offered to pursue a petition for postconviction relief, upon further review, "no issue presented itself for such a petition"; and that the defendant "[had] given [him] no reason to think any such issue to collaterally attack [his] conviction exists."

¶ 15 The defendant also attached his own affidavit. He averred that after entering his negotiated guilty plea, Giovannini told the defendant that he could secure a lesser sentence for a guilty plea and that he could not receive a longer prison sentence than he had previously received. Based on that information, the defendant asked counsel Zinger to withdraw and for Giovannini to represent him instead. Relying on Giovannini's directions and because he had been assured that he could not receive a longer sentence than was previously imposed, the defendant pled guilty a second time. However, as a result of relying on Giovannini's advice, the defendant must now serve a longer sentence. The defendant alleged that if he had known that Giovannini's advice was incorrect, and that he could actually receive a greater sentence, the defendant would not have vacated his first guilty plea or sentence. Additionally, the defendant would not have pled guilty on July 15, 2004, and

would have opted for a jury trial instead. The defendant further contended that his appellate counsel never raised the issue of Giovannini's false or untrue statement.

¶ 16 On September 1, 2011, the trial court summarily dismissed the defendant's petition in a 10-page written order, expressly concluding that the court found that the issue raised by the defendant was "frivolous and patently without merit," citing *People v. Hodges*, 234 Ill. 2d 1 (2009). The trial court's order also cited *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) for the proposition that a *pro se* postconviction petition may be summarily dismissed as frivolous or patently without merit during the first stage of postconviction review unless the allegations in the petition, taken as true and liberally construed, present the "gist" of a valid constitutional claim. Additionally, citing *People v. Porter*, 122 Ill. 2d 64, 77 (1988), the trial court noted that the defendant's attorney-prepared petition would be reviewed under the same standard as a *pro se* petition. The trial court found that the defendant's claim that Giovannini guaranteed no greater sentence on his plea was clearly contradicted by the record. The trial court noted that the defendant acknowledged that he understood that the trial court would determine his ultimate penalty, there were no guarantees, and each side would argue for the applicable minimum and maximum sentences. Additionally, the trial court found that the defendant failed to establish prejudice where the evidence of his guilt was overwhelming. The trial court entered a certified report of disposition on September 16, 2011, stating that the defendant's "petition for postconviction relief is dismissed as frivolous and patently without merit."

¶ 17 In this court, the defendant asserts that the trial court reviewed his petition under the improper and more stringent "sufficient facts" standard. We disagree.

¶ 18 Proceedings under the Act begin with the filing of a petition in the circuit court where the

original proceeding took place. *Hodges*, 234 Ill. 2d at 9. At this stage, the petition need only present the gist of a constitutional claim, a low threshold, and a defendant need only present a limited amount of detail in his petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). After it independently reviews the defendant's petition, if the circuit court finds that the claims alleged in the petition are frivolous and patently without merit, the court "shall dismiss the petition in a written order specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous or patently without merit if it has no arguable basis in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* In considering a petition, the trial court may examine the court file of the proceeding in which the petitioner was convicted, as well as any action taken by an appellate court and the transcripts of such proceedings. 725 ILCS 5/122-2.1(c) (West 2010). All petitioners are subject to the same standard for summary dismissal, whether they are represented by counsel or not. *People v. Tate*, 2012 IL 112214, ¶ 11-12; *Porter*, 122 Ill. 2d at 77.

¶ 19 Here, the trial court applied the correct standard when dismissing the defendant's petition. In its written order, the trial court explicitly noted the "frivolous and patently without merit" standard for dismissal articulated in *Hodges* and *Edwards*. Of note, *Edwards* explicitly rejected the "sufficient facts" test that had been used in previous cases. *Edwards*, 191 Ill. 2d at 244. Additionally, the trial court's certified report of disposition stated that the defendant's petition was "dismissed as frivolous and patently without merit." In addition to the trial court explicitly citing

the correct standard, we see nothing in the record that suggests that it subjected the defendant's petition to a more stringent review. We ordinarily presume that the trial court knows and follows the law unless the record indicates otherwise. *Gaultney*, 174 Ill. 2d at 420. Further, even if the trial court used an incorrect standard, it is of no consequence. We review the trial court's judgment and not the reasons given for the judgment, and can affirm the trial court on any basis supported by the record even if the trial court reasoned incorrectly. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 20 Next, the defendant merely states that his petition set out an arguable basis for a claim of ineffective assistance of counsel. The defendant presents no further argument, analysis, or legal authority. In response, the State contends that the defendant's claim of ineffective assistance of counsel is waived, barred by *res judicata*, and was properly dismissed because it is entirely contradicted by the record. The defendant has not replied to any of these issues.

¶ 21 Even assuming that no procedural bar applies, the defendant's petition was properly dismissed as frivolous and patently without merit because its allegations are directly contradicted by the record of plea proceedings. Dismissal of a postconviction petition may be upheld when the allegations are contradicted by the record from the original trial proceedings. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001); *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1988). Here, in response to multiple questions on the issue, the defendant consistently indicated that he understood that the trial court would determine his sentence and there was no agreement to the contrary. For each count, the trial court admonished the defendant of the maximum and minimum sentences each side would urge, as well as the possibility of his sentences running consecutively or concurrently. Both times the trial court asked, the defendant denied that he had been induced to plead guilty. He was given ample

opportunity to change his mind and proceed to trial once the consequences of entering a blind plea were made clear to him. The defendant's responses demonstrate that he understood the potential range of his sentence and that the trial court would determine his penalty. The record contradicts his assertion that he pled guilty because of Giovannini's promise that he could not receive a longer sentence than was previously imposed. The trial court was meticulous in ascertaining the defendant's understanding of the consequences of entering a blind plea and that the defendant was not induced to do so. The defendant was unequivocal in his responses. Thus, his claim that he was induced to plead guilty is contradicted by the record, indisputably meritless, and properly dismissed. See *People v. Ramirez*, 162 Ill. 2d 235, 240-43, 245 (1994).

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.